UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITARIAN UNIVERSALIST CHURCH OF AKRON, et al.,	)	CASE NO. 5:00CV 3021
	)	
	)	JUDGE WELLS
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF FAIRLAWN, et al.,	)	**MOTION TO DISMISS SECOND AMENDED COMPLAINT**
	)	
Defendants.	)	

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants move this Court to dismiss this action because:

1. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, *et seq.* ("the Act") is unconstitutional.

2. Regardless of whether the Act is Constitutional, Count I of the Second Amended Complaint still fails because the Act is not retroactive.

3. The denial of Plaintiffs' petition to re-zone does not infringe upon any rights guaranteed under the First Amendment or the comparable Rights of Conscience provision of the Ohio Constitution, and thus, Counts II, III, IV, and X fail to state a claim upon which relief may be granted.

4. Similarly, the Fairlawn Land Use Regulations do not violate the Due Process clause of the Fourteenth Amendment contrary to the allegations in Count VI.

5. The Fairlawn Land Use Regulations also do not violate the Equal Protection Clause of the Fourteenth Amendment as alleged in Count V.

6. The denial of Plaintiffs' re-zoning petition did not constitute a "taking" under the Fifth Amendment or the Ohio Constitution as alleged in Count XI.

7. Contrary to the allegations in Counts VII, VIII, and IX, the Fairlawn Land Use regulations do not violate Ohio law; and

8. The individual Defendants named in the Second Amended Complaint are entitled to Qualified Immunity.

A memorandum in support of this motion is attached and incorporated here by reference.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules and Regulations:

Miscellaneous:

STATEMENT OF ISSUES

I: Did the Congress exceed its Constitutional Authority when enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000 cc, *et seq.*?

II: Did the Defendants act consistent with the First Amendment to the United States Constitution and the Ohio Constitution's "Rights of Conscience" provision by denying a church's request for rezoning that would allow the church to build an addition to its existing structure?

III: Is a zoning ordinance enacted within the constraints of constitutional due process when the ordinance limits the construction of church buildings in virtually all residential districts in the city?

IV. Should a complaint alleging a violation of the Equal Protection Clause of the Fourteenth Amendment be dismissed when the pleading contains only bare conclusions of alleged discrimination and irrational acts without actual allegations to support the conclusions?

V. Should a complaint of unconstitutional taking under the Fifth Amendment of the United States Constitution and Article I of the Ohio Constitution be dismissed when the complaint lacks any allegation that the zoning ordinance at issue imposed a near total economic loss on the Plaintiff?

VI. Should a complaint alleging a violation of Ohio law resulting from an alleged conflict between a municipal ordinance and a State statute be dismissed when a statute requires the municipality to allow for certain structure uses while the municipality's ordinance limits the structures that can be built?

VII. Should the individual public officials named as Defendants be entitled to qualified immunity when the complaint contains no allegation demonstrating that the individuals had notice of the Religious Land Use and Institutionalized Persons Act after the legislation was enacted?

SUMMARY OF ARGUMENT

The Plaintiffs' Second Amended Complaint should be dismissed because none of the legal theories alleged are sufficient to state a claim upon which relief may be granted. The federal statute that is the predicate to the Plaintiffs' claim is unconstitutional because the Act neither substantially affects interstate commerce nor does it concern the general welfare of the United States. Thus, Congress exceeded the authority granted to it under the Spending Clause and Commerce Clause of the Fourteenth Amendment to the United States Constitution, and the statute provides no basis for relief.

The Plaintiffs claim that the City of Fairlawn enacted zoning ordinances that violated not only the unconstitutional Religious Land Use and Institutionalized Persons Act, but also the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. But to the contrary, the zoning ordinances are consistent with these constitutional constraints. The ordinances at issue are nearly identical to those previously examined by the Sixth Circuit in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. The City of Lakewood*, 699 F.2d 303 (6th Cir. 1983). In that case, the Sixth Circuit held that the indistinguishable municipal zoning ordinance did not violate either the First Amendment or the Fourteenth Amendment's due process clause. Moreover, the opinion of the lower court, the Northern District of Ohio, dismissed the *Lakewood* plaintiff's claim of an Equal Protection violation. Thus, the law is well-settled, and the claims before this Court should similarly be dismissed.

The Plaintiffs have also failed to state a claim for a regulatory taking because no such taking can occur without a near total economic deprivation. But the Plaintiffs have made no allegation to meet that standard.

Without any federal claims that can survive this Motion to Dismiss, the state law claims also should be dismissed because this Court should decline to exercise the required pendent jurisdiction. But regardless of how the Court rules on the federal claims, it should not exercise its supplementary jurisdiction to hear Plaintiffs' state law claims which involve only questions of statutory interpretation. If, however, this Court would undertake that interpretation, the state law claims should be dismissed on their merits because Plaintiffs incorrectly allege that the municipal ordinance conflicts with the state's statute. Ohio Revised Code §713.15 requires municipalities to allow for certain uses of structures. The City of Fairlawn's Ordinance 1286.03 limits the construction of certain structures. Thus, no conflict exists between the evidence and the statute that would violate state law.

Finally, the individual named Defendants should be dismissed because they are protected by the doctrine of qualified immunity. Nothing in the Second Amended Complaint is sufficient to demonstrate that the individual named Defendants acted in such a way to violate clearly established statutory or constitutional rights. *Lakewood* refutes any claim to a clearly established constitutional right in this case, and the new and untested Religious Land Use Act could not create a clearly established statutory right.

MEMORANDUM IN SUPPORT

I. Introduction

The Unitarian Universalist Church of Akron, its Pastor Nancy Arnold, and its member Charles Nelson (collectively "Plaintiffs" or "the Church") allege that Defendant City of Fairlawn only allows churches in portions of the city zoned as "M-3 districts."[1] (Complaint, ¶34).[2] The Unitarian Universalist Church of Akron, however, is located in an R-2 district. (Complaint, ¶41). The Church was built in 1961, before the R-2 ordinance was adopted, and the Church is thus a legal non-conforming use. (Complaint, ¶¶39, 43). The Church wanted to add a 5,400 square foot "Fellowship Hall" to its building. (Complaint, ¶25). But to do that, the Church alleges that it had to get its property re-zoned to an M-3 district. This action was filed after Defendants denied Plaintiffs' petition for such re-zoning.

For relief, Plaintiffs seek a declaratory judgment, preliminary and permanent injunctions, and damages against the City of Fairlawn, its members of council and various other elected and appointed officials (collectively "Defendants"). Plaintiffs claim that the denial of the re-zoning petition violated The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000 cc *et. seq.* ("the Act"); the First, Fifth and Fourteenth Amendments to the United States Constitution; Ohio Revised Code §713.15; and the Ohio Constitution. But reading nothing more than Plaintiffs' Complaint reveals that none of Plaintiffs' claims are sufficient as a matter of law. Thus, the Complaint should be dismissed.

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[1] Chapter 1256 of the Codified Ordinances of the City of Fairlawn defines such districts. See Exhibit A to Plaintiffs' Second Amended Complaint.

[2] Plaintiff filed its original Complaint on December 4, 2000 and later filed a First Amended Complaint on January 11, 2001, and finally a Second Amended Complaint. This brief will refer to the Second Amended Complaint as "the Complaint."

II. Law and Argument

A. Count I of The Complaint Fails to State a Claim Upon Which Relief May Be Granted Because The Federal Act It Is Based on Is Neither Constitutional Nor in Conflict With The City's Ordinance.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et. seq.* ("the Act") was enacted in response to the United States Supreme Court's decision *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that the Act's previous incarnation, The Religious Freedom Restoration Act ("RFRA"), was unconstitutional. The Court reasoned that in enacting RFRA, Congress exceeded its power under Section 5 of the Fourteenth Amendment of the United States Constitution. *Id.*

In an attempt to overturn the *Flores* decision and to correct the constitutional problems identified by the Court in that case, Congress redrafted the Act and stated that the Act was being promulgated under the Spending and Commerce Clauses found in Article I, Section 8 of the United States Constitution along with its enforcement powers contained in Section 5 of the Fourteenth Amendment. *H.R. Rep. 106-219, pp. 12-13.*[3]

A review of RFRA and the Act reveals that they are virtually identical in content and in spirit. The only substantive differences between the RFRA and the Act are: (1) Congress adopted the Act pursuant to its Spending and Commerce Clause powers and stated it applies in any case in which "a substantial burden is imposed in a program or activity that receives federal financial assistance" or "affects . . . commerce with foreign nations"; and (2) Congress focused the Act on "land use" regulations which impose a substantial burden on the religious exercise of a person as

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[3] The Fourteenth Amendment guarantees that no state shall make or enforce any law depriving any person of "live, liberty or property, without due process of law" or denying any person the "equal protection of the laws" (Section 1) and empowers Congress "to enforce" those guarantees by "appropriate legislation" (Section 5).

opposed to the broader language of the RFRA, which prohibited governments from "substantially burden[ing] a person's exercise of religion". *See*, 42 U.S.C. §2000cc(a)(1) (the Act) and 42 U.S.C. §2000bb - 1 (RFRA).

These changes, however, did not cure the constitutional defects which doomed RFRA. For the same reasons RFRA was found to be unconstitutional by the Supreme Court in *Flores*, this Court should likewise find the Act to be unconstitutional.

1. <u>Congress Exceeded Its Commerce Clause Authority by Enacting the Act</u>

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court addressed the scope of Congressional commerce clause authority. The court found that Congress may regulate three broad categories of activity under its commerce powers:

1. The use of the channels of interstate commerce;

2. The instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and

3. Those activities having a substantial relation to interstate commerce.

Id. at 559.

To evaluate whether Congress exceeded its commerce clause authority, the Supreme Court instructed: "that the proper test requires an analysis of whether the regulated activity (substantially affects) interstate commerce." *Id.* The Court in *Lopez* ultimately held that Congress had exceeded its authority in enacting the Gun Free School Zones Act which made it a federal offense for any individual knowingly to possess firearms in a place that the individual believes or has reasonable cause to believe is a school zone. *Id.*

For the same reasons, this Court should find that Congress exceeded its Commerce Clause authority in enacting the Act. The Act prohibits governments from implementing land use regulations "in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. §2000cc(a)(1). However, prohibiting governments from imposing or implementing certain types of land use regulations has nothing to do with "regulating commerce". The Act does not regulate "the use of the channels of interstate commerce", the "instrumentalities of interstate commerce, or persons or things in interstate commerce even though the threat may come only from intrastate activities" or "those activities having a substantial relation to interstate commerce." Indeed, the Act "by its terms, has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Like the situation in *Lopez*, the Act in this case has no affect on interstate commerce, let alone the "substantial affect" required for Congress to rightfully exercise its Commerce Clause authority. Therefore, for the same reasons the Supreme Court found that Congress had exceeded its Commerce Clause authority in enacting Gun Free School Zones Act, this Court should likewise find that Congress exceeded its authority in relying upon the Commerce Clause in enacting the Act.

2. Congress Exceeded Its Spending Clause Authority by Enacting the Act

As stated above, in addition to relying upon its alleged authority under the Commerce Clause, Congress also relied upon its alleged authority under Article 1, Section 8, Clause 1 -- the Spending Clause -- as authority for enacting the Act. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the United States Supreme Court restated the test to be applied in determining whether Congress has properly exercised its Spending Clause authority. In that case, which involved a challenge by the State of South Dakota to the constitutionality of a federal statute conditioning states' receipt of a

portion of federal highway funds upon the adoption of a minimum drinking age of 21, the court began its analysis by restating that under Article 1, Section 8, Clause 1,

> Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). . . . The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the court, resolving a longstanding debate over the scope of this Spending Clause, determined that "the power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article 1's "enumerated legislative fields" . . . may nevertheless be attained through the use of the spending power and conditional grant of federal funds."

Dole, 483 U.S. at 207.

The court went on to state that "the spending power [of Congress] is of course not unlimited . . . but is instead subject to several general restrictions articulated in our cases." *Id.* These restrictions are as follows:

> 1. The exercise of the spending power must be in pursuit of "the general welfare." *See Helvering v. Davis*, 301 U.S. 619 (1937).
>
> 2. If Congress desires to condition a states' receipt of federal funds, it "must do so unambiguously . . ., enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).
>
> 3. Conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States*, 435 U.S. 444 (1978).

In *Dole*, the United States Supreme Court ultimately found that Congress had properly exercised its powers under the Spending Clause in enacting the statute conditioning states' receipt of a portion of federal highway funds on the adoption of a minimum drinking age of 21 because not only did the statute meet the three criteria listed above but it also addressed an "interstate problem [which] required a national solution." *Id.* at 208.

The Religious Land Use and Institutionalized Persons Act does not meet any of these criteria. An Act which imposes restrictions on local and state land use regulation can hardly be said to deal with "the general welfare" of the United States. Moreover, the legislative history of the Act does not indicate that Congress conditioned the receipt of federal financial assistance "unambiguously . . . enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207. *See also H.R. Rep. 106-219, pp. 12-13*. Most fatal, however, is that the Act is not related "to the federal interest in particular national *projects or programs*". *Id*. (emphasis added). *See also, H.R. Rep. 106-219, p. 12*. To the contrary, the Act was enacted in response to a single Supreme Court decision, as the House Report specifically states that the Supreme Court's decision in *Flores* was the impetus for the Act. *See H.R. Rep. 106-219, p. 5*. Accordingly, Congress exceeded its authority under Article 1, Section 8, Clauses 1 and 3 (the Commerce and Spending Clauses) in enacting the Act. This Court should therefore find that the Act is unconstitutional.

3. The Act is Unconstitutional Pursuant to the Supreme Court's Decision in *Flores*

In addition to overstepping its powers to enact this legislation under the Commerce and Spending Clauses contained in Article 1, Section 8 of the Constitution, the Act is unconstitutional for the same reasons RFRA was found to be unconstitutional by the Supreme Court

in *Flores*. In *Flores*, the Supreme Court found "the RFRA is not a proper exercise of Congress' Section 5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance." *Flores*, 521 U.S. at 508. The principal reason the Supreme Court found the RFRA to be unconstitutional was:

> RFRA is so out of proportion to a supposed remedial or preventable object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. * * * [Its s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. . . . RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion. * * * Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. * * * [RFRA] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. * * * Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.

Flores, 521 U.S. at 532, 533, 534, 535 (citations omitted).

Just like RFRA, the Act is out of proportion to the supposed remedial or preventative object -- in this case, preventing governments from imposing "substantial burdens on the religious exercise of a person." 42 U.S.C. §2000cc(a)(1). The legislative history of the Act shows that while witnesses testified about isolated incidents of religious discrimination at the hearings held prior to the enactment of the Act, there was no testimony or evidence presented of instances of generally

applicable land use laws that had been passed because of religious bigotry. *H.R. Rep. 106-219, pp. 17-18.*

In addition, like RFRA, the Act has "sweeping coverage" and "ensures its intrusion at every level of government, displacing laws and prohibiting official actions" with respect to land use regulations, as it applies to every government agency and official [42 U.S.C. §2000cc-5(4)(A)]. Like RFRA, it has no termination date or termination mechanism. Like RFRA, any state or local law is subject to challenge at any time by any individual who claims "a violation of the free exercise clause or a violation of Section 2000cc of this title" [42 U.S.C. §2000cc-2(b)]. Like RFRA, a governmental entity which is sued under the Act must demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest in order to prevail. [Section 2000cc(a)(1)(A) and (B)]. As stated by the Supreme Court in *Flores* this "is the most demanding test known to constitutional law." *Flores*, 521 U.S. at 534.

Just like RFRA, the Act constitutes a considerable "congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id*. at 534. Thus, just like the RFRA, the Act is unconstitutional.[4] Count I of the Complaint must therefore be dismissed.

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[4] According to the Complaint, the City of Fairlawn amended its zoning code in 1993. (Complaint, ¶32). The Act, however, was signed into law on September 22, 2000. (Complaint, ¶67). As the United States Supreme Court held in *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), "[r]etroactivity is not favored in the law. . . ." The Court also declared, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* As the Act is not retroactive, Count I of the Complaint fails to state a claim upon which relief may be granted even if the Act fails to pass Constitutional muster by this Court.

B. Counts II, III, IV And X Should Be Dismissed Because The Denial of Plaintiffs' Petition Does Not Infringe Upon the First Amendment Or The Ohio Constitution's Rights of Conscience Provision.

The essence of Plaintiffs' Complaint is stated in the first paragraph of the pleading:

> Plaintiffs challenge the constitutionality and legality of the Codified Ordinances of Fairlawn . . . . Plaintiffs' challenge includes, but is not limited to, a challenge to certain legislation enacted by the City of Fairlawn . . . creating the 'M-3 District' zoning classification and the elimination of churches as conditionally permitted uses in residential districts; to Defendants' denial of the Church's petition for rezoning; and to Defendants' denial of the Church's use variance or special exemption request."

This constitutional cry, however, is a familiar one which is now routinely rejected by courts in this and other Circuits across the country. Indeed, the leading decision on this zoning issue is from this Circuit, and that court rejected a similar claim on grounds less obvious than those presented in the pleading before this Court.

In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983), "[t]he principal question presented [was] whether a municipal zoning ordinance, which prohibits the construction of church buildings in virtually all residential districts in the city, violates the Free Exercise Clause of the First Amendment." *Id.* at 303. The court further explained that

> after the Congregation had purchased the lot, the City enacted a new zoning code. . . . The Congregation's lot is designated R-2, limiting its uses to single family dwellings and 'roomers.' Church buildings are permitted only in M-3, M-2, BR, and B-2 districts, which compromise approximately ten percent of the City's land. * * * The Congregation claims that the ordinance infringes its right to freedom of religion by prohibiting it from constructing Kingdom Hall on the lot it owns.

Id. at 305.

Faced with facts nearly identical to the allegations before this Court, the *Lakewood* court held:

> The Lakewood ordinance 'simply regulates a secular activity and, as applied to the appellants, operates so as to make the practice of their religious beliefs more expensive.' It does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, *we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause, has not been infringed*.

Id. at 307-308 (emphasis added, citations omitted). For precisely the same reasons, Count II of Plaintiffs' Second Amended Complaint should be dismissed. Moreover, Plaintiffs' attempt to reiterate the same claim dressed in the clothing of "Free Speech" and "Freedom of Assembly" must also fail, and thus, Counts III and IV also should be dismissed.

Likewise, Plaintiffs' claim in Count X that the zoning ordinances violated the Plaintiffs' Rights of Conscience under Ohio Constitution Article I, Section 7, fails for the same reasons that Plaintiffs cannot state a free exercise claim. Indeed, Article I, Section 7 is comparable to the First Amendment. *South Ridge Baptist Church v. Industrial Commission of Ohio*, 676 F. Supp. 799, 808 (S.D. Ohio 1987). The Ohio Supreme Court and the Southern District of Ohio therefore noted that "the decisions of the United States Supreme Court can be utilized to give meaning to the guarantees found in Article I of the Ohio Constitution." *Id.*, *quoting*, *State ex rel. Heller v. Miller*, 61 Ohio St. 236 (1980). The *South Ridge Baptist Church* Court further explained that "Ohio courts have given no indication that they would apply Article I of the Ohio Constitution more stringently than the United States Supreme Court has applied the First Amendment." *Id.* As a result, Count X should be dismissed.

C. Count VI of the Second Amended Complaint Must Be Dismissed Because *Lakewood* Also Found That The Ordinance Did Not Violate The Due Process Clause of The Fourteenth Amendment.

In addition to deciding that the Lakewood ordinance did not violate the First Amendment, the Sixth Circuit held that the ordinance was consistent with the Due Process Clause:

> The facts of the present case show that the ordinance does not infringe the Congregation's religious freedom. Furthermore, the ordinance does not offend the Due Process Clause because it is a legitimate exercise of the City's police power. The ordinance merely frustrates the Congregation's desire to locate itself in a more pleasant, more convenient and less expensive location. Such desires, however, are not protected by the Constitution.

Id. at 309.

That law applies with equal force now, because Plaintiffs make a claim nearly identical to the one in *Lakewood*. The *Lakewood* plaintiff claimed "that the Lakewood ordinance effectively eliminates religious worship from the city because it limits the location of new churches to ten percent of the City." Similarly, Plaintiffs here claim: "The Fairlawn Land Use Regulations amount to a ban on churches and an unreasonable restriction on the completion, restoration, reconstruction, extension, or substitution of preexisting churches." (Complaint ¶98).

The Sixth Circuit disagreed with the claims then, and this Court should disagree now. As the Sixth Circuit explained:

> We disagree. The effect of the Lakewood ordinance is not to prohibit the Congregation or any other faith from worshiping in the City. Although the Congregation may construct a new church in only ten percent of the City, the record does not indicate that the Congregation may not purchase an existing church or worship in any building in the remaining ninety percent of the City.

Id. at 307.

Of course, this Court has greater reasons to disagree with the Plaintiffs herein. The Sixth Circuit's hypothetical description of being able to worship in an existing building is now a fact alleged by the Plaintiffs before this Court. In paragraph 20 of the Complaint, Plaintiffs acknowledge that the "present structure was constructed in 1961. . . ." Furthermore, the Plaintiffs add, "Because the Church existed before the Ordinance was adopted, the Church is a legal non-conforming use." (Complaint ¶43). Thus, *Lakewood* should compel this Court to dismiss Count VI of the Complaint.

D. Count V of the Second Amended Complaint Must Be Dismissed Because the Ordinance Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

In Count V of the Second Amended Complaint, Plaintiffs claim that classifying religious organizations differently than other institutional uses "violates the Equal Protection Clause of the United States Constitution by discriminating against religious uses of land among religious institutions, and because the Fairlawn Land Use Regulations have been implemented irrationally and wholly arbitrarily, and with animus towards churches and Plaintiffs, in particular." (Complaint ¶95). These legal conclusions, however, are not sufficient for the claims to withstand this Motion to Dismiss.

The standards for establishing an equal protection claim are well established. Plaintiffs have the "burden of proving that discriminatory purpose was a motivating factor in the [City's] decision." *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 270 (1977). In addition, "the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). In light of these standards, Plaintiffs claim that the

Fairlawn ordinance is discriminatory, and that the ordinance was implemented arbitrarily and with animus, are mere tautology.

But Federal Rule of Civil Procedure 12(b)(6) requires more. "While the [12(b)(6)] standard is decidedly liberal, it requires more than bare assertions of legal conclusions." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). The "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* Thus, in an analogous circumstance, the Seventh Circuit dismissed a complaint for failure to state an antitrust claim and announced:

> The pleader may not evade these requirements merely by alleging a bare legal conclusion; *if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust*.

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (quotation marks omitted, citations omitted, emphasis added).

More recently, the First Circuit followed this reasoning, cited *Car Carriers*, and dismissed an antitrust complaint where the plaintiff only alleged terms like "conspiracy" and "agreement" without more specific allegations in support:

> [Plaintiff] asserts that the district court was required to accept, for purposes of the motion to dismiss, that such a conspiracy existed, however implausible it might be. But terms like 'conspiracy' or even 'agreement,' are borderline: they might well be sufficient in conjunction with a more specific allegation – for example a written agreement or even a basis for inferring a tacit agreement – but a court is not required to accept such terms as a sufficient basis for a complaint. The case law on this point is ample.

DM Research v. College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999) (citations omitted).

For the same reasons, the Church's Equal Protection claim is insufficient. The Complaint lacks any factual allegation in conjunction with the conclusory claims of irrationality and

discriminatory animus, and merely dressing up allegations in the language of the equal protection doctrine should get the Church nowhere.

For the Church to state a claim of invidious discrimination that violates the Equal Protection Clause, the factual focus must be on the purpose underlying the decision to deny the re-zoning petition or allegedly classifying religious organizations differently from other institutional uses. Indeed, the United States Supreme Court has explained:

> The respondents proceeded on the erroneous theory that the Village's refusal to re-zone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision.

Arlington Heights, 429 U.S. at 268. Notwithstanding the guidance provided by *Arlington Heights*, the Church has not offered any factual allegation concerning the defendant's purpose for "classify[ing] religious organizations differently from other institutional uses" or concerning the purpose and manner in which "the Fairlawn Land Use Regulations have been implemented . . . ." (Complaint, ¶¶ 94, 95). Instead, the Complaint is filled with only conclusory allegations that these decisions carried a discriminatory effect. But without more, Plaintiffs fail to state a claim for a constitutional violation.

Likewise, Plaintiffs have failed to sufficiently allege that classification of religious organizations by the Fairlawn Land Use Regulations, or the implementation of those regulations, was arbitrary. Once again, the law set forth by the Sixth Circuit in *Lakewood* is instructive:

> Given the standard of review established in *Euclid* and its progeny, and the minimal burden on Lakewood to justify its zoning ordinance, we hold that the ordinance does not violate the due process clause. The district court found that the City created exclusive residential districts to control traffic congestion and off-street parking in secluded residential areas. The exclusion of uses except residential substantially minimizes congestion, noise and confusion due to motor

> vehicle traffic. The City has legitimately and rationally exercised its police power to preserve a 'quiet place where yards are wide, people few, and motor vehicles restricted.' *Belle Terre [v. Boraas]*, 416 U.S. [1,] 9, 94 S.Ct. at 1541.

Lakewood, 699 F. 2d at 308.

Although the Sixth Circuit was examining the rationality of the ordinance in the context of the due process clause, the concerns raised in the Plaintiffs' Complaint here do not change the analysis. Indeed, the Sixth Circuit did not address the equal protection analysis only because the District Court for the Northern District of Ohio had previously dismissed the equal protection claim, and the *Lakewood* plaintiff chose not to appeal that obviously correct ruling.[5] As in *Lakewood*, the inquiry under both the due process clause and equal protection clause remains whether the ordinance was enacted and implemented rationally. *Lakewood* provides the answer in the affirmative, and the Plaintiffs have not provided any allegation to defeat the Sixth Circuit's explanation. Thus, Counts V and VI of the Second Amended Complaint should be dismissed.

E. The Denial of Plaintiffs' Re-zoning Petition Does Not Constitute a "Taking" Under the Fifth Amendment to the United States Constitution or Article I of The Ohio Constitution.

Count XI of the Complaint alleges that the City of Fairlawn's ordinances "continue to deprive, restrict and deny Plaintiffs of and from the economically beneficial and productive use of the Church property" and thus violates the Takings Clauses of both the Fifth Amendment to the United States Constitution and Article I, §§16 and 19 of the Ohio Constitution. *See Complaint* at ¶¶127-129. But again, Plaintiffs fail to state a claim upon which relief may be granted.

It is well established that a zoning ordinance must impose a near total economic loss before a "taking" would be found under the Fifth Amendment to the United States Constitution. *See*

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[5] For the convenience of the Court, a copy of the District Court's decision in *Lakewood* is attached as Exhibit A.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *accord, Nollan v. California Coastal Community*, 483 U.S. 825 (1987). In *Pearson v. City of Grand Blanc*, 961 F. 2d 1211 (6th Cir. 1992), the court also determined that a "taking" in the zoning context is defined as occurring only when there is a "deprivation of economic viability of the property." *Pearson*, 961 F. 2d at 1215. Such a deprivation is "a prerequisite for bringing such an action" under the Fifth Amendment to the United States Constitution. *Id.*

All of the above cases make clear that Plaintiffs have failed to state a claim upon which relief may be granted under the Takings Clauses of either the Fifth Amendment of the United States Constitution or Article I, §§16 and 19 of the Ohio Constitution.[6] Indeed, the only claim Plaintiffs have made in this regard is that the church property is not as valuable as it would be with the addition completed. *See Complaint* at ¶129. That is not a "total taking" as required to state a claim for a regulatory taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). As Plaintiffs have failed to state a claim under either the Fifth Amendment to the United States Constitution or Article 1, §§16 and 19 of the Ohio Constitution, Count XI of the Second Amended Complaint must be dismissed.

F. <u>The Fairlawn Land Use Regulations Do Not Violate Ohio Law</u>

Before addressing the substance of Plaintiffs' state law claims, this Court should decline to exercise supplementary jurisdiction over those claims because 28 U.S.C. §1367 specifically states that a federal court shall not invoke its jurisdiction over state law claims unless such claims are "so related to claims in the action within such original jurisdiction, that they form

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[6] *St. Paul's Episcopal Church v. Oakwood*, No. C-3-88-230, 1998 WL 165172 (S.D. Ohio March 3, 1998) (a copy of which is attached as Exhibit B) held that federal case law interpreting the United States Constitution will apply when interpreting the Ohio Constitution.

part of the same case or controversy under Article III of the United States Constitution." *See* 28 U.S.C. §1367(a); *see also Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

The purported conflict between the City of Fairlawn's ordinance, an Ohio statutory provision and the Ohio Constitution involve questions of state law that are independent of the facts underlying in this case. The Courts of the state of Ohio are the bodies which are best able to interpret those statutes and the Ohio Constitution.

In the event this Court is inclined to exercise its supplemental jurisdiction over Plaintiffs' state law claims, it should nevertheless dismiss those claims. Revised Code §713.15 provides that a municipality must allow for the:

> [C]ompletion, restoration, reconstruction, extension, or substitution of non-conforming uses upon such reasonable terms as are set forth in the zoning ordinance.

Fairlawn's ordinance 1286.03 provides:

> The expansion, extension or reconstruction of a building housing as [sic] non-conforming use, either upon the lot occupied by such building or on an adjoining lot, shall not be permitted.

Plaintiffs allege that these two provisions conflict, thus causing the ordinance to be invalid under Ohio law. The alleged contradiction, however, does not exist. Revised Code §713.15 addresses the *use* a structure may be put to; City of Fairlawn ordinance §1286.03, on the other hand, refers to *the structure itself*. This distinction shows that the Fairlawn ordinance does not conflict with Ohio law.

Cicerella v. Jerusalem Bd. of Zoning Appeals, 59 Ohio App. 2d 31 (Cuyahoga App. 1978) addressed the issue raised by Plaintiffs in the Complaint. Its holding makes it clear that there is a distinction between the use that a structure may be put to and the structure itself. The same distinction was recognized by this Court in *MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio 1990). In *MacMillan*, plaintiff wished to erect a radio antenna on the roof of his house.

The City of Rocky River had an ordinance which prohibited the erection of such towers on homes. The District Court granted partial summary judgment in favor of the City holding that the City's zoning ordinance, which prohibited the plaintiff from erecting the antenna on the roof of his home, was Constitutionally valid because it only addressed the use that the structure (in this case a home) was put to and did not prohibit the plaintiff from continuing to live in his house.

In this case, Plaintiffs' non-conforming use will continue even though the construction of the fellowship hall is prohibited under the City of Fairlawn's new zoning ordinance. There is nothing unconstitutional therefore about the City of Fairlawn's ordinance. It does not violate Ohio Revised Code §713.15 or the Ohio Constitution. Counts VII, VIII and IX of Plaintiffs' Complaint must therefore be dismissed.

G. The Individual Defendants Named in the Complaint Are Entitled to Qualified Immunity.

Plaintiffs claim that various elected and appointed officials of the City of Fairlawn are liable under 42 U.S.C. §1983 for the denial of Plaintiffs' petition to re-zone its property. But the Complaint demonstrates that the doctrine of qualified immunity precludes Plaintiffs from making these claims. Indeed, "[r]esolution of [this] issue is purely a matter of law for the trial judge to determine . . . ." *Dominique v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

The qualified immunity defense exists when the conduct of government officials "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Walton v. City of Southfield*, 995 F.2d 1331, 1335 (6th Cir. 1993), *quoting*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Sixth Circuit has further recognized that this standard means the conduct should be measured by pre-existing law: "[This] is to say that in light

of pre-existing law the unlawfulness must be apparent." *Id., quoting, Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

In this case, the pre-existing law is *Lakewood*. Given that decision, Plaintiffs certainly cannot plead any facts to show that the Defendants violated clearly established constitutional rights by denying the Plaintiffs an opportunity to build an addition on the church. The law and facts of *Lakewood* clearly support the conduct of the Defendants here.

Similarly, no clearly established rights could have existed as a result of the Religious Land Use and Institutionalized Persons Act. Given the close similarity that Act has to its predecessor, the unconstitutional Religious Freedom Restoration Act, even the validity of the new Act cannot be considered "clearly established." Moreover, with a statute as new and untested as the Religious Land Use Act, no rights deriving from it could be "clearly established," even if the statute were valid.

IV. Conclusion

For all the reasons stated herein, Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted. This Court should therefore dismiss Plaintiffs' Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2001, a Motion to Dismiss Second Amended Complaint was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Gregory A. Gordillo
One of the Attorneys for Defendants